



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/47380/2014  
IA/47387/2014  
IA/47392/2014  
IA/47403/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 April 2016

Decision & Reasons Promulgated  
On 18 May 2016

Before  
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR SUJITH CHAMINDA RATNAWEERA  
MRS DELANI VINONI SAMANTHINKA PEDURU ARACHCHIGE  
[S R]  
[K R]  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Jafar, Counsel, instructed by Lee Valley Solicitors  
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. Following my error of law decision, promulgated to the parties on 26 February 2016 (set out in full at Annex 1), I adjourned the appeal for a continuation hearing. The current decision is the remaking of the decision on the Appellants' appeals.

2. In brief, I had found that the First-tier Tribunal Judge materially erred in his consideration of the Appellants' Article 8 claims. Nothing could be salvaged from the First-tier Tribunal's decision.
3. The Appellants are all nationals of Sri Lanka. The first and second Appellants are married and are the parents of the third and fourth. The third and fourth Appellants were born on [ ] 2000 and [ ] 2004 respectively. They both entered the United Kingdom on 1 October 2007.

### **The evidence before me**

4. I have the Respondent's original appeal bundle containing the application forms, other supporting evidence, the notices of immigration decisions (refusals to vary leave to remain and removal under section 47 of the Immigration, Asylum and Nationality Act 2006), and the reasons for refusal letters.
5. From the Appellant I have two bundles, now marked AB1 and AB2.
6. The first Appellant gave brief oral evidence, a note of which is contained in the Record of Proceedings. He told me that he has been back to Sri Lanka alone twice since his arrival in 2006. The children have not been back since their arrival in 2007. The first Appellant has a father and four sisters in Sri Lanka, whilst his wife has her mother there. The children do not know any Tamil, speak Sinhalese to a basic level, but cannot read or write that language.
7. Based on instructions, Mr Jafar told me that the third Appellant was undertaking his GCSEs in May 2016, the fourth Appellant was now in Year 7, the second Appellant was a nursery teacher, and that the first Appellant was an IT engineer, working as a sole trading sub-contractor to Thames Water.

### **Submissions**

8. Mr Jafar accepted that the Appellants could not meet the Rules insofar as they relate to Article 8. He relied on the recent decision in PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). There are similarities between that case and the present, with reference to paragraphs 23-24 of the former. The fourth Appellant is part of an observational medical study. The third Appellant is at a crucial stage of his education. There are ties outside of school. I was asked to follow Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC). The best interests and welfare of the two children indicated being allowed to remain here. There was no overstaying in these appeals. The time spent in the United Kingdom consisted of formative years in the children's lives. It was suggested that section 117B(3) of the 2002 Act did not relate to the costs of education, but went to the ability of a family to support itself.

9. Ms Fijiwala submitted that because the Appellant could not meet the Rules, compelling circumstances had to be shown in order for them to succeed under Article 8. I was referred to EV (Philippines) [2014] EWCA Civ 874 and to PD at paragraph 29. The third Appellant had lived in Sri Lanka between the ages of one and seven. There was family in that country. The children could learn to read and write Sinhalese. The best interests of children were not determinative. All the Appellants were here on a precarious basis. All relevant factors should be assessed when considering reasonableness under section 117B(6) of the 2002 Act. This includes the circumstances of the parents. It is reasonable for the children to leave the United Kingdom with their parents. It was accepted if the third and/or fourth Appellants succeeded in their appeals, so would the first and second.

### **Findings and reasons**

10. The burden of proving material facts rests with the Appellants and the standard of proof is that of a balance of probabilities.
11. There has been no challenge by the Respondent to the credibility of any of the evidence before me. I have no sound reason to doubt any of it. I find that the evidence provided by the Appellants in all its forms is both truthful and reliable. Based upon this, I make the following findings of primary fact.

#### *The first Appellant*

12. I find that the first Appellant arrived in the United Kingdom on 22 September 2006 and has remained with leave at all times. The last category in which he was granted leave was as a Tier 1 Highly Skilled Migrant. This leave expired on 11 September 2014. However, the last application to the Respondent was made on 8 September 2014, and so the previous leave was and continues to be extended by virtue of section 3C of the Immigration Act 1971.
13. I find that the first Appellant is an IT engineer, and the director of a company registered with Companies House as SKD Global Networking Limited (25 AB2). He operates as a sole trader. I accept that he has (along with his wife) fully financially supported the family unit without recourse to public funds, and that he would continue to do so in the future.
14. I find that he has been back alone to Sri Lanka twice since 2006, in 2010 and 2011. His father and four sisters reside there.
15. I find that the first Appellant speaks Sinhalese.

#### *The second Appellant*

16. I find that the second Appellant arrived in the United Kingdom on 1 October 2007, together with the third and fourth Appellants. She has remained here ever since with

leave as the dependent of the first Appellant. Her leave is also currently extended under section 3C of the 1971 Act.

17. I find that the second Appellant is a full-time nursery teacher at [ ] School, and has been since November 2009 (24 AB2). The reference letter from the Headteacher speaks very highly of her and I find that she is a valued member of staff in what is clearly an important role.
18. I find that the second Appellant speaks Sinhalese and that she has her mother in Sri Lanka.

#### *The third Appellant*

19. The third Appellant arrived here on 1 October 2007. He too has had leave ever since, leave that is also currently extended under the 1971 Act. At the time the latest application was made to the Respondent, he had been in this country for some three weeks short of seven years. As at the date of the hearing before me, he had been here for eight years and some six months.
20. I find that he started attending school very shortly after arrival (there are award certificates dating back to 16 November 2007 – 38 AB1). He has attended school throughout his time here and is currently undertaking GCSEs at [ ] School (14 AB2). His final listed exam is on 21 June 2016 (16 AB2). It is readily apparent from the educational evidence as a whole that the third Appellant has done very well at school.
21. Whilst I do not have very much detail about social ties, I accept the first Appellant's written evidence that his son has established numerous friendships within and outside of school, and that he is fully integrated into British life. This is hardly surprising given the length of time spent in this country and the formative years contained therein.
22. I find that he is a keen Taekwondo participant (18 AB2).
23. I accept that the third Appellant has not been back to Sri Lanka since his arrival here in 2007. There is no evidence of him having had any other form of contact with that country and I find that there have been no meaningful connections over the course of his time in the United Kingdom.
24. In respect of linguistic abilities, I find that he can speak Sinhalese to a basic standard only, but cannot read or write the language. He has no Tamil at all.
25. The third Appellant has no health problems.

#### *The fourth Appellant*

26. As with her brother and mother, the fourth Appellant arrived here on 1 October 2007 and has had leave ever since. That leave is extended under the 1971 Act. She has obviously been here for the same period of time as her brother.

27. I cannot quite tell when she started at primary school, but she certainly progressed through the years in the normal way. She started her secondary education in September 2015 (20 AB2), and so is now in the latter stages of Year 7. She has done well in her education and appears to be within the expected levels for her age (15 AB1).
28. I accept her parent's evidence that she too has made friends within school and beyond. Such ties may perhaps be somewhat less strong given her age. I find that she too is involved in Taekwondo.
29. The fourth Appellant has an inherited eye condition called RPE65-related Leber Congenital Amaurosis, described in the medical letter at 23 AB2 as being "severe, progressive, inherited retinal dystrophy." There is at present no treatment for this condition. The third Appellant appears to be involved in an observational study into the condition at Moorfields Hospital. I do not have any evidence of additional support needs at school, and I find that there are none.
30. The third Appellant has not been to Sri Lanka since her arrival here in 2007. I find that like her brother, she has no meaningful contacts or ties with that country.
31. In respect of language, I find that she can speak Sinhalese at a basic level, but cannot read or write it. She has no Tamil.

### **Conclusions on Article 8 within the Rules**

32. Mr Jafar has accepted throughout that the Appellants cannot satisfy the Rules as they relate to Article 8. In my view he is right to have adopted this position.
33. By virtue of the Appellants' status in the United Kingdom, the fact that they live together as a single family unit, and that the children had not been in the United Kingdom for seven years at the date of the application, they are not able to meet the requirements of any of the routes under Appendix FM to the Rules.
34. In respect of paragraph 267ADE of the Rules and the first and second Appellants, Mr Jafar's concession has the effect of accepting that there are no "very significant obstacles" to their re-integration into Sri Lankan society. If one were to take their circumstances in artificial isolation from the children for present purposes, Mr Jafar's position is a realistic one.
35. Turning to the children's claims under Rules, the insuperable problem here is that neither of them had been in the United Kingdom for the requisite seven years as at the date of application made to the Respondent on 8 September 2014. They may have been only just short of the qualifying threshold, but short they were. We have recently been reminded of the danger in applying a 'near miss' view of such scenarios, and I do not fall into that particular trap (see Chau Le (Immigration Rules -

de minimis principle) [2016] UKUT 00186 (IAC)), although this issue is not without relevance to the claims outside of the Rules.

36. Thus, all four appeals must fail under the Rules.

### **Conclusions on Article 8 outside of the Rules**

37. As a consequence of the foregoing, all four appeals are to be assessed outside the ambit of the Rules. In so doing, I am guided by PD and Miah (section 117B NIAA 2002 - children) [2016] UKUT 00131 (IAC), amongst other decisions. I also direct myself to the need for the Appellant to show “compelling” or “exceptional” circumstances in order to succeed (see, for example, PD at paragraph 43 and SS (Congo) [2015] EWCA Civ 387).

38. In addition, as Ms Fijiwala quite properly accepted, all four appeals stand or fall together. This is in keeping with the reality of the Appellants’ circumstances and the observations at paragraphs 26-28 of PD.

#### *Family life*

39. There is quite clearly strong family life as between the Appellants themselves.

40. There are no familial relationships with other people in the United Kingdom.

#### *Private life*

41. All four Appellants enjoy their own private lives in this country, and there has been no dispute about this by the Respondent.

42. The first Appellant has established himself and his family here. He has been residing here lawfully for close to twelve years, and runs a successful business. I also infer that he has made friendships over the course of time.

43. The second Appellant has been here for a lengthy time as well. She has been working as a teacher since 2009 and will clearly have established friendships within the professional environment and very likely beyond.

44. The third and fourth Appellants’ private lives consist of their social and educational development and ties in this country over the course of eight and a half years.

#### *Interference*

45. There is no question that the removal of the Appellants would constitute a sufficiently serious interference with their respective private lives so as to engage Article 8. As the Appellants would be removed together, there would be no interference with family life.

*In accordance with the law and legitimate aim*

46. There is no dispute about these issues.

*Proportionality*

47. I begin the balancing exercise with an assessment of the children's best interests and welfare (with reference to ZH (Tanzania) [2011] UKSC 4 and section 55 of the Borders, Citizenship and Immigration Act 2009). In so doing I have had regard to all of the evidence before me, evidence that I have found to be credible, as set out previously.
48. The third Appellant has been here for a substantive period: over half his life and throughout the important years following the attainment of four (see Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC)). He has been educated by our system from the age of seven and continues to be so. He has passed from primary education into the secondary phase. He has clearly thrived in both. As I write, he is undertaking his GCSE exams, on any view a critical juncture in his young life. I readily infer that there is every intention and expectation that he will continue to progress in his education and I have no doubt that he would seek to undertake A-levels and eventually move onto university.
49. I have found that he has good friendships both within and without school, and takes part in extra-curricular activities.
50. He is, I conclude, a young man who has been shaped by and is now immersed in British society, culture and values.
51. In stark contrast, I conclude that his ties to Sri Lanka are now, at best, minimal. I have found that his linguistic abilities are very limited indeed. This only highlights the extent to which his life and identity (and to a lesser degree those of his parents) are embedded in this country rather than that of his birth. In returning to Sri Lanka now, he would have to rapidly learn to speak fluently in order to reintegrate socially and progress educationally (even assuming he did not have to have formal linguistic qualifications at GCSE-equivalent level before being able to undertake A-levels there), and would have to learn to read and write Sinhalese from scratch. The third Appellant is a bright individual, but on any view this would entail a formidable undertaking for a teenager already integrated in another country, both intellectually and emotionally.
52. The third Appellant has not been to Sri Lanka since arriving here. He does not have meaningful contact with people there. Having left at seven, this will have resulted in some memories of that country being laid down. However, one needs to apply a degree of common sense to this. Young children adapt to and absorb new surroundings quickly, and a previous life is likely to recede into the memorial distance during a lengthy period in another country in which significant roots are being established, particularly when these extend beyond simply the immediate

family (thus, the reasoning in Azimi-Moyaed relating to the plus four year-old scenario).

53. Taking all of the above into account and viewed through the lens of Article 8 private life, I am of the very firm view that the best interests and welfare of the third Appellant are served by him remaining in the United Kingdom. In addition, it has never been suggested that the third Appellant could somehow remain in this country without his parents and sister. It follows that his best interests lie not only in remaining in the United Kingdom, but that this state of affairs would involve living with his family here too.
54. Turning to the fourth Appellant, some of same factors apply to her as they do to her brother. She arrived here aged three, and so has spent almost three times longer in the United Kingdom than she had in Sri Lanka. It is right that she is younger than her brother, but nonetheless she has progressed through primary school and has just started her secondary education which, to my mind, is a significant stage in a young person's life. I have found that she too has friendships within and beyond the school gates.
55. Her linguistic abilities are as limited as those of the third Appellant. Returning to Sri Lanka would entail learning to speak Sinhalese fluently and to read and write in that language, as she would be compelled to obtain a GCSE-equivalent in her "mother tongue" before being able to progress to A-levels (see 67 AB1). She would at least have some time in which to undertake the learning process. Nonetheless, having spent all of her educational and effective social life in this country, having to adapt to a new schooling system and a new social environment at the same time as learning a new language (in terms of its three facets) would entail a very significant disruption to her.
56. In relation the fourth Appellant's medical condition, it appears as though she is not disabled by it (at least not currently) as regards her education and daily life. There is no treatment for it, and so a return to Sri Lanka would make no difference in terms of specialist care. I have no evidence on any studies undertaken in Sri Lanka. I have not been told that her presence in this country is essential as part of the observational study referred to earlier. On this particular issue, I conclude that a return would not impinge negatively on her best interests.
57. The fourth Appellant's ties with her home country are, I conclude, negligible. She will not have had the time in which to put down any effective memories of her life there, having left aged just three. She has not been back, and will have no material experience of life, culture and society in Sri Lanka.
58. Taking the above as a whole and viewing the matter through the private life lens, I conclude that her best interests and welfare lie in remaining in this country, together with her family. I would say that my conclusion on the fourth Appellant is not as firmly based as that on her brother.



59. The welfare and best interests of the third and fourth Appellants are not of course 'trump cards' in the assessment of proportionality. With this in mind, I turn to other relevant matters.
60. The public interest in maintaining effective immigration control is a mandatory and weighty factor which I take fully into account, having regard to section 117B(1) of the 2002 Act. All of the Appellants are and have always been subject to immigration control.
61. The Appellants have not met the Rules as these relate to Article 8. That in itself counts against their collective claim. The Respondent, with the approval of Parliament, has set out what she regards as appropriate criteria by which Article 8 claims should be assessed and, if satisfied, will lead to success. For the purposes of the Rules, that fact that the third and fourth Appellants missed out on the seven-year qualifying criteria in paragraph 276ADE(iv) by a matter of weeks is by-the-by, although the time they have spent here remains highly relevant in the overall balancing exercise. The consequence of failing to meet the Rules is that according to the current state of binding decisions of the Court of Appeal (none of which, it should be noted, deal specifically with the relevant aspects of Part 5A of the 2002 Act arising in these appeals), "compelling" or "exceptional" circumstances must exist in order for the claims to succeed.
62. All of the Appellants speak fluent English. Thus, no additional weight is added to the Respondent's side of the scales (section 117B(2)).
63. The first and second Appellant have supported themselves and the children throughout their time in this country. Nothing negative arises on that specific point. However, as was pointed out in paragraph 34(c) of PD, the children have been and would continue to be educated at public expense. Thus, section 117B(3) bites to an extent.
64. Section 117B(4) does not apply in these appeals. All of the Appellants have been in the United Kingdom lawfully throughout. That is not insignificant, in that so often appellants have been overstayers for considerable periods of time (as was the case in PD itself - paragraph 33).
65. It is right that the Appellants' status has been "precarious" in the sense that it is not settled. According to section 117B(5) and the analysis in Deelah and others (section 117B - ambit) [2015] UKUT 00515 (IAC) I must therefore attribute "little weight" to the Appellants' private lives. I have to say that for what it is worth I find three consequences of section 117B rather problematic: first, that there is no difference in the reduction of weight attributable to private between those lawfully here and those unlawfully resident (sections 117B(4) and (5)); second, that the weight given to a child's private life, established over the course of, say, ten or eleven years, is automatically reduced to "little" simply as a result of not having been here for the requisite seven years as at the date of an application to the Respondent (with reference to paragraph 276ADE(iv) of the Rules); third, I am concerned with how

comfortably section 117B(5) sits with the best interests/welfare considerations and section 117B(6).

66. I turn to the question of reasonableness. This is crucial for two reasons. First, in order for the third and fourth Appellant's to succeed in their appeals, they need initially to show that it would be unreasonable to expect them to leave the United Kingdom. This is the test established by the House of Lords in EB (Kosovo) [2008] UKHL 41, and as far as I am concerned remains binding authority on this point. Indeed, the "reasonableness" test is now enshrined in primary legislation (section 117B(6)) and the Rules (paragraph 276ADE(iv)). Second, the first and second Appellants seek to rely on satisfaction of the test in respect of their Article 8 claims, by virtue of section 117B(6).
67. The statutory test is that of "reasonableness", not "insurmountable obstacles" or the like. Whilst the latter may not exist here, that is not the point: the applicable threshold is less demanding.
68. In assessing reasonableness, I consider all relevant circumstances in the round, including those of the first and second Appellants. Whilst I of course note what is said in EV (Philippines) and do consider the parents' situation, like the Upper Tribunal in PD (paragraph 36) I observe that section 117B(6) was not in play before the Court of Appeal and the children concerned had been in the United Kingdom for only a very short period.
69. The first factor I take into account are the best interests and welfare of the children, as set out in some detail at paragraphs 47-58, above. In short form, their removal would be wholly contrary to this primary consideration. In particular, predominant factors include the percentage of their respective lives spent here, the crucial stage reached in the third Appellant's education, the immersion in the life of the United Kingdom (particularly so in relation to the third Appellant), and the lack of meaningful ties of their own to Sri Lanka.
70. I do not believe that the instruction in section 117B(5) can have the effect that "little weight" must also be placed upon the best interests/welfare of the children. Whilst these interests are in reality part and parcel of their private lives, it simply cannot have been the intention of Parliament to effectively negate the importance of ZH (Tanzania), section 55 of the 2009 Act and the UN Convention on the Rights of the Child in this way. I place very significant weight upon the best interests/welfare considerations in the context of the reasonableness test.
71. I have full regard to the matters adverse to the Appellants under section 117B, as outlined above. That the Appellant's have always been subject to immigration control tends towards removal being reasonable. The failure to satisfy the Rules pertaining to Article 8 has a similar effect, as does the public purse consideration relating to the funding of education.

72. Having said that, it is not as though the children and their parents have had no right to be in the United Kingdom; they have had leave throughout, albeit on a temporary basis.
73. It is right that the first and second Appellants have ties to Sri Lanka. There are relatives and it is foreseeable that they could obtain decent employment upon return. I place weight on this factor. However, for the reasons elaborated previously the third and fourth Appellant's have no meaningful ties themselves, and this is important when assessing the reasonableness of their departure from this country. I attach greater weight to this factor than to the parents' ties.
74. I take into account that Sri Lanka is not a war-torn or particularly impoverished country. There is a functioning education system in place which, subject to language issues and everything else I said previously, the children could gain access to.
75. I bear in mind the fact that the family unit would be removed together. In the context of these appeals, however, that is obvious and adds little weight to the Respondent's side of the balance.
76. I have also had regard to the Respondent's own guidance on children and long residence, as cited in PD at paragraph 37:

"The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years."

The third and fourth Appellants have been here for eight and a half years, a not insignificant time beyond the seven year mark. In addition, whilst there are undoubtedly reasons why departure could in principle be reasonable, having regard to all that I have said, they are not strong reasons.

77. Bringing all of the above together, I conclude that it would not be reasonable to expect the third and fourth Appellants to leave the United Kingdom. My conclusion in respect of the third Appellant is stronger than that on the fourth.
78. The final hurdle over which the third and fourth Appellants must climb is the need to show "compelling" or "exceptional" circumstances. In light of my findings and conclusions in these appeals I deem there to be "compelling" circumstances. These are as follows, and can be read in isolation or cumulatively.
79. First, that fact that it would be not only contrary to the children's best interests and welfare to leave the United Kingdom, but would also be unreasonable, amounts to a "compelling" circumstance.
80. Second, I bear in mind what is said by the Court of Appeal at paragraph 38 of SS (Congo) about the "near miss" situation:

“However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.”

81. Here, given that I have found that it would be unreasonable for the third and fourth Appellants to leave the United Kingdom, the sole basis for failure under the Rules was the shortfall of some *three weeks* in the accrual of seven years residence prior to their parents applying to the Respondent in 2014 (I note that children should not be 'punished' for the actions of their parents). This too amounts to a “compelling” circumstance.
82. Third, the combination of the following go to disclose further “compelling” circumstances:
  - a) The fact that the third and fourth Appellant’s have now spent over half and about three-quarters of their respective lives here;
  - b) The level of integration into British life;
  - c) Their educational stages, particularly that of the third Appellant;
  - d) The lack of ties to Sri Lanka.
83. The appeals of the third and fourth Appellants succeed on Article 8 grounds outside of the Rules.
84. I now turn to the first and second Appellant’s appeals. The first matter to note is that Ms Fijiwala accepted that if the children succeeded in their appeals, the parents would also win. On the basis of this concession I could truncate matters here and simply state that I am allowing all the appeals. However, it is appropriate that I set out the basis for my conclusions on the first and second Appellant’s appeal in more detail.
85. In this regard I turn then to section 117B(6). The third and fourth Appellants are both “qualifying children” by virtue of the long residence here (section 117D(1)(b)). The first and second Appellant clearly have a “genuine and subsisting parental relationship” with their children. I have already found that it would be unreasonable to expect the children to leave the United Kingdom. Therefore, the three constituent parts of section 117B(6) are satisfied.
86. The primary consequence of the satisfaction of section 117B(6) is that the first and second Appellant’s appeal succeed on Article 8 grounds outside of the Rules. This is

because in my respectful view the analysis and conclusions of the President at paragraphs in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC) are correct. Once the requirements of section 117B(6) are met this is determinative of the Article 8 public interest question.

87. However, I am aware that there are differing views about the correctness of Treebhawon, and that the Court of Appeal may be examining the point at some stage. I therefore think it appropriate to provide an alternative conclusion on the first and second Appellant's appeals.
88. If section 117B(6) is not determinative of the proportionality exercise, I nonetheless conclude that the first and second Appellant's cases succeed outside of the Rules. This is so for the following reasons.
89. First, I refer back to what I have said already about the various factors considered within the balancing exercise, in particular those relating to Part 5A matters. There are matters which tell both for and against the parents. Those against are certainly not of the import seen in so many cases (in particular having regard to the lawful residence, employment, and fluent English).
90. Second, I take into account that the first Appellant is employed in a skilled profession, and contributes to the economy by virtue of taxes paid. The second Appellant is employed in an important sector and she makes a valuable contribution to society. I place weight upon this, with reference to UE (Nigeria) [2010] EWCA Civ 975.
91. Third, the fact that their children cannot reasonably be expected to leave the United Kingdom and that "compelling" circumstances exist, must be and is a telling factor in favour of the parents' cases. The section 117B(6) factor and presence of "compelling" circumstances in the children's cases is very significant and amounts in my view to a "compelling" circumstance attributable to the appeals of the first and second Appellants.
92. Fourth, to require the first and second Appellants to leave the United Kingdom without their children has never been a position adopted by the Respondent. Nor has the possibility of the parents taking the children back notwithstanding that it would be unreasonable for the latter to go. The consequence of this is that a further "compelling" circumstance is present.
93. Fifth, the matters adverse to the first and second Appellants under section 117B are ultimately outweighed by points two to four, above.
94. As a result of everything I have said, all four appeals succeed on Article 8 grounds outside of the Rules.

**Anonymity**

95. I make no direction as one has not been requested and would not be necessary in any event.

**Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I re-make the decision by allowing the appeals of all four Appellants on Article 8 grounds outside of the Immigration Rules.**

Signed  
H B Norton-Taylor  
Deputy Judge of the Upper Tribunal

Date: 11 May 2016

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. Material evidence has been submitted after the applications were made and the success of the appeals is based upon necessary adjudication on contentious issues by the Tribunal.

Signed  
Judge H B Norton-Taylor  
Deputy Judge of the Upper Tribunal

Date: 11 May 2016

**ANNEX 1: ERROR OF LAW DECISION**

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/47380/2014  
IA/47387/2014  
IA/47392/2014  
IA/47403/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 February 2016**

**Decision & Reasons Promulgated**

.....

**Before  
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR SUJITH CHAMINDA RATNAWEERA  
MRS DELANI VINONI SAMANTHINKA PEDURU ARACHCHIGE  
[S R]  
[K R]  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr A Jafar, Counsel, instructed by Lee Valley Solicitors  
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. These are appeals by the four Appellants against the decision of First-tier Tribunal Judge Cohen (the judge), promulgated on 15 June 2015, in which he dismissed their appeals under Article 8, both within and without the Immigration Rules (the Rules).

2. The appeals to the First-tier Tribunal had been against the Respondent's decisions dated 11 November 2014, refusing applications to vary leave to remain in the United Kingdom and giving directions for removal under section 47 of the Immigration, Asylum and Nationality Act 2006. The first two Appellants are husband and wife and they in turn are the parents of the third and fourth Appellants. The third Appellant was born on [ ] 2000 and the fourth Appellant, his sister, was born on [ ] 2004.

### **The judge's decision**

3. At paragraph 5 of his decision the judge states that the third Appellant was about to commence his GCSEs and that the younger child was about to start secondary school in September of that year. The judge makes reference to the "substantial amount of evidence" relating to the children's education in the United Kingdom. At paragraph 11 the judge refers to Appendix FM to the Rules and concludes that none of the Appellants could satisfy the relevant provisions. He then goes on to consider Article 8 outside of the Rules. The substance of his considerations is all contained within paragraph 15. The judge refers to section 55 of the Borders, Citizenship and Immigration Act 2009, and to the Court of Appeal judgment in EV (Philippines) [2014] EWCA Civ 874. Reference is made to the lack of settled status of any of the Appellants, and that none of them had a legitimate expectation of being able to remain in this country permanently. The judge finds that it would be in the children's best interests to return to Sri Lanka with their parents, where they could enjoy extended family relationships with grandparents, aunts and uncles and other close family members. The judge finds that there would be adequate educational facilities for the two younger Appellants in Sri Lanka. He notes what he describes as the "similarities" between the appeals before him and the factual matrix of EV (Philippines). He concludes that it would be "entirely reasonable" to expect the children to go with their parents back to Sri Lanka. The judge then adds: "the UK cannot educate the world".
4. The appeals were dismissed under the Rules and on freestanding Article 8 grounds.

### **The grounds of appeal and grant of permission**

5. The Appellants sought permission to appeal essentially on the basis that the judge failed to deal adequately with the circumstances of the third and fourth Appellants, and in particular the length of time that they had spent in the United Kingdom. Permission was refused initially by the First-tier Tribunal but then granted by Upper Tribunal Judge Goldstein on 4 November 2015.

### **The hearing before me**

6. At the outset Mr Jafar agreed that although the judge had failed to consider paragraph 276ADE of the Rules in respect of the third and fourth Appellants, this made no difference to the outcome of the appeals given the age of the third appellant at the date the applications for further leave to remain were made. Mr Jafar relied on the grounds and confirmed that the core of his argument related to the age of the third and fourth Appellants, the time spent in this country and their best interests.



7. Ms Willocks-Briscoe submitted that the judge was aware of the children's schooling in the United Kingdom and she referred in this respect to paragraph 5 of the decision.

### **Decision on Error of Law**

8. I find that there are material errors of law in the judge's decision.
9. The judge has failed to have any or any adequate regard to the significant factor of the third and fourth Appellants' educational ties in this country, as opposed to simply what they may be able to access if returned to Sri Lanka. It was not in dispute before the judge that the third Appellant was (contrary to the error in paragraph 5) about to start the second year of his GCSEs. Further, the fourth Appellant was finishing Year 6 of primary school and was therefore about to commence her secondary level schooling. These were obviously very important factors, and they were coupled with the children's ages and in particular the fact that the third Appellant had been in this country for over seven years. That period of time accrued after the attainment of 4 years of age, and it is clear from cases such as Azimi-Moayed [2013] UKUT 197 (IAC), E-A [2011] UKUT 315 (IAC) and SC [2012] UKUT 56 (IAC) (amongst others) that factors such as the time spent in this country and the particular educational stage reached are significant and need to be dealt with properly. Indeed there is judicial comment to the effect that "strong countervailing reasons" are required if a conclusion is to be reached that removal would be reasonable in cases with similar factual matrixes to the present appeals.
10. In my view the factors taken into account and considered in paragraph 15 of the judge's decision in effect all relate to the position on return to Sri Lanka and there is nothing, or at least nothing adequately expressed, on the United Kingdom-based factors. There is no consideration or reasoning in respect of the substantial amount of evidence adduced on the Appellants' behalf relating to educational progress. The passing reference to the children's schooling in paragraph 5 of the decision does not in any way rescue the defects in paragraph 15.
11. In addition, the judge's comment that there were similarities in the factual matrix between these appeals and EV (Philippines) is misplaced, particularly given that the children in that case had been in this country for only three years.
12. In short, the judge has failed to adequately address highly relevant factors and this renders his conclusion that it would be reasonable for the third and fourth Appellants to leave the United Kingdom unsustainable.
13. I therefore set aside the judge's decision.

14. I would just add that comments such as “the UK cannot educate the world” are not particularly helpful and are best avoided.

### **Disposal**

15. Both representatives were agreed that if material errors of law were found these appeals should remain in the Upper Tribunal. That is the appropriate course of action.
16. In the normal course of events I would be remaking the decision now, and on the evidence currently before me. However, Ms Willocks-Briscoe had not had the opportunity of reading much of the relevant paperwork in advance of the hearing (through no fault of her own) and it was felt as though further oral evidence from the first and second Appellants would be useful in providing me with the best possible picture of the family’s current circumstances.
17. In light of these two factors I adjourn these appeals for a continuation hearing before me. My decision on error of law and relevant directions will be issued to the parties forthwith.

### **Anonymity**

18. No direction was made by the First-tier Tribunal, and none has been sought from me. There is no particular reason for making one. I make no direction.

### **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I adjourn these appeals for a continuation hearing before me at Field House.**

### **Directions to the parties**

1. **The Appellants are, no later than 14 working days prior to the continuation hearing, to file and serve on the Upper Tribunal and Respondent any further evidence relied upon;**
2. **The Appellants are, no later than 14 working days prior to the continuation hearing, to file and serve on the Upper Tribunal and Respondent a skeleton argument setting out relevant arguments with reference to the evidence and case-law relied upon.**

**Directions to Listings**

- 1. The Error of Law decision is to be sent out to the parties forthwith;**
- 2. These appeals are adjourned for a continuation hearing before Deputy Upper Tribunal Judge Norton-Taylor at Field House on 19 April 2016 at 10am;**
- 3. There is a time estimate of 1 ½ hours;**
- 4. No interpreter is required.**

**No anonymity direction is made**

Signed  
Deputy Judge of the Upper Tribunal

Date: 24 February 2016